Supreme Court, U.S.
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No. 93-1114

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1993

DONALD C. WINSTON

Petitioner,

v.

MAINE TECHNICAL COLLEGE SYSTEM,

CENTRAL MAINE TECHNICAL COLLEGE,

AND

RICHARD CONRATH

Respondents.

PETITIONER'S REPLY BRIEF

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QUESTIONS PRESENTED

I. Is the question of whether the Petitioner's disability is covered under the Rehabilitation Act absent the retroactive application of Section 706(8)(F) before the Court?

II. Is the issue of whether Section 706(8)(F) should apply retroactively a sufficiently important issue to warrant certiorari?

III. Was the decision below correct?

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STATEMENT OF THE CASE

In this Reply Brief the Petitioner points out that the facts set out by the

Respondent taken from the decision of the Maine Superior Court are not the appropriate statement of facts in this case. Rather the facts to be considered are essentially those set out by the Maine Supreme Court reviewing a summary judgment on the basis that: "The factual assertions viewed in the light most favorable to Plaintiff may be summarized as follows...." Winston v. Maine Technical College System, 631 A.2d 70, 72 (Me. 1993), Petition for Cert., App. A, at 3.

Respondent notes the decision of the Maine Superior Court finding that the Petitioner's condition did not qualify for protection as a disability under the Rehabilitation Act. It should be noted in the first instance that the Maine Superior Court made no analysis under the law of the applicability of the Rehabilitation Act to

Petitioner's condition. Rather the Court, noting its dissatisfaction with the statutory definitions of disability, expressed the "confidence" that the Petitioner's condition would be determined not "such a significant impairment of mental condition as qualifies him for protection under the various civil rights laws protecting persons with disabilities." Petition, App. F, at 11-12. Furthermore, the Maine Supreme Court did not rely upon the Maine Superior Court either for its findings of fact nor for its legal conclusion. Rather it expressly relied upon a legal issue not considered by the Superior Court. Winston, 631 A.2d at 74, Petition for Cert., App. A at 10-11.

On page 8 of its Brief, Respondent points to the decision of an arbitrator. The Maine Supreme Court expressly held that

the arbitrator's decision does not establish the facts conclusively in this case nor preclude the Petitioner's assertion of this claim under the anti-discrimination statutes. Winston, 631 A.2d at 73, Petition for Cert., App. A, at 8-9. Nevertheless, it should also be noted that the arbitrator expressly upheld the Petitioner's termination not because of his conduct but expressly because of fear of potential liability of the employer in the event of incidents arising out of the Petitioner's condition.

The Respondent further attempts to diminish the Petitioner's condition by equating it to that of a "running addict", essentially suggesting that trivial conditions would be covered under the Petitioner's theory. That is not the case. The requisites of the law are quite clear

and would protect against trivial conditions resulting in findings for employees. The law, of course, requires that any condition result in a significant limitation of one or more major life activity to be considered a disability under the law. Winston, 631 A 2d at 73, Petition for Cert., App. A, at 10.

I. THE QUESTION OF WHETHER THE PETITIONER'S CONDITION IS COVERED BY TEH REHABILITATION ACT ABSENT RETROACTIVE APPLICATION OF SECTION 706(8)(F) IS NOT BEFORE THE COURT.

The Respondent suggests that the Rehabilitation Act would have excluded the Petitioner's claim here because his condition does not qualify as a handicap or, in the alternative, that he was not otherwise qualified.

By this argument, of course, the Respondent is asking this Court to decide

issues which have not yet been considered and determined by the state court "of last resort", the Maine Supreme Court.

Since the Maine Superior Court did not analyze the issues under the appropriate laws, this issue has never been properly considered under the requirements of the law.

If, in fact, the issues were as clear as the Respondent suggests, it is most likely that the Maine Supreme Court would have adopted the Superior Court's rationale and applied the law as it stood rather than take the risky approach of retroactive application of a statute making substantive changes in the law. Instead of finding the need to rely upon Section 706(8)(F), if it believed that that section did not change the law, it need not have relied upon that section.

The Respondent argues that the Petitioner is seeking to excuse misconduct in that his theory would in fact block employers from dealing with misconduct appropriately. That is not the case.

First of all, in this case the facts to which the Petitioner is entitled are that there was no misconduct, that he and an adult student engaged in consensual behavior, a kiss. The Petitioner argues further, however, even if misconduct were found, his termination was still illegal. The Petitioner claims that in any event he would not have been terminated but for the perception of the employer that he was "deeply troubled psychologically". Winston, 631 A.2d at 72, Petition for Cert., App. A, at 4. If misconduct had indeed been committed, that argument would not preclude appropriate discipline of an

employee. But any discipline that would have been imposed absent the perception of deep psychological disturbance would have been less than termination. That does not mean that all discipline would be precluded. In fact, termination for "sexual harassment" is not mandatory. In fact, this employer's rules with respect to sexual harassment specifically provided for a number of lesser actions in the event of sexual harassment.

The Respondent attempts to lump the Petitioner in with sexual urges that "drive individuals ... to victimize others". It should be noted here that there is no victim. The consensual conduct between Plaintiff and the student was without victim. In fact, Plaintiff's condition has not led and does not lead to seeking victims. The Petitioner has always acted

out with consensual partners. This is true with all prior established instances of the expressions by the Petitioner of his impulse control disorder.

Furthermore, the Petitioner's condition is not "just 'poor impulse control'". He has been diagnosed by both a psychiatrist and a licensed clinical social worker, (statutorily authorized to diagnose and treat mental illness) as having a condition recognized under the DSM-R III, an Impulse Control Disorder.

The Respondent seeks to put extremes before the Court suggesting that under the Petitioner's position an employee could safely yield to his urges and be protected under the law. Further the more an employee acted out his impulses the stronger his protection. That of course is not the case, again the standards of the

law would specifically prevent such from happening. The employer is protected both by the definitions of disability and by the requirements that an employee be "otherwise qualified." As shown above, appropriate discipline for misconduct is not precluded by the law, just as it would not be for misconduct by an alcoholic. Surely any employee who demonstrated such a lack of control or intent to engage in misconduct would not fare well under the individualized assessment required under the standard of "otherwise qualified with or without reasonable accommodation". In the present case, no individualized assessment was ever done. But subsequent to the termination, there was competent psychological evidence from a psychotherapist in the arbitration proceedings that the Petitioner was in

recovery and was no longer a danger to students. All of these issues of course are for consideration in the first instance by the state court of last resort.

Accordingly, this Court should address the specific issues addressed by the Maine Supreme Court and challenged here by the Petitioner.

II. CONTRARY TO THE RESPONDENT'S POSITION, WHETHER SECTION 706(8)(F) SHOULD APPLY RETROACTIVELY IS AN IMPORTANT ISSUE FOR CONSIDERATION BY THE COURT

The Petitioner submits that the question of the retroactive application of Section 706(8)(F) is sufficiently important to warrant this Court's review. The issue of retroactive application of substantive federal statutes in the State of Maine is broadly applicable. The decision of the Maine Supreme Court would mean that all such statutes would be interpreted in

accordance with its decision in this case. That would leave the Maine Supreme Court in conflict with the First Circuit Court of Appeals and potentially with this Court.

More importantly, this Court has accepted for certiorari two cases dealing with the issue of retroactivity of federal statutes. They are Landgraf v. USI Film Products, No. 92-757 (5th Cir., cert. petition filed October 28, 1992) and Rivers v. Roadway Express, Inc., No. 92-938 (6th Cir., cert. petition filed December 2, 1992). This Court's determination in those cases might very well affect the decision in this case and warrant remand to the Maine Supreme Court for reconsideration.

III. THE DECISION BELOW IS NOT CORRECT

This point is set out in the Petition for Certiorari. However, the Respondent

claims that the Petitioner cites Aledo-Garcia v. the Puerto Rico National Guard Fund, 887 F.2d 354 (1st Cir. 1989) "only because the result in that case turned out to favor the employee, but that is not a principled basis." That does not accurately reflect the Petitioner's position. Aledo-Garcia sets out an analysis determining retroactivity of federal statutes should be applied in some cases and not in others, and that that case was appropriate for retroactivity. The fact that it favored the employee in that case is not determinative of anything.

The Respondents further argue that the Petitioner departs from the facts in the record. The Respondents state that this is a case of the teacher who was properly terminated for misconduct and who was seeking to avoid responsibility for his

actions. Brief in Opposition, at 32-33. To the contrary, this decision having been rendered on a motion for summary judgment originally, the Petitioner is entitled to the facts most favoring his position and that in fact was what the Maine Supreme Court did. Winston, 631 A.2d at 72, Petition for Cert., App. A, at 3. Thus for purposes of this petition, the Petitioner was not guilty of misconduct and had been fired not for sexual harassment but for fear of his psychological condition. Although not the case, even if the Petitioner had engaged in misconduct, the facts most favorable to him establish that he would not have been terminated but for the fear of his psychological condition. Whether other discipline would have been appropriate was not established.

CONCLUSION

The Petition for Writ of Certiorari should not be denied.

Dated: March 15, 1994

Respectfully submitted,

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